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and Proposed Interim Co-Lead Counsel for
6 *the Direct Purchaser Plaintiffs*

7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

10 IN RE TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

Case No. C-07-1827 SI

MDL No. 1827

12 This Document Relates To:

14 ALL DIRECT PURCHASER ACTIONS

**NATHAN MUCHNICK, INC.'S
RESPONSE TO THE MAY 4, 2007
MOTIONS FOR APPOINTMENT
OF DIRECT PURCHASER
PLAINTIFFS' INTERIM CO-
LEAD COUNSEL, AND CROSS-
MOTION FOR APPOINTMENT
OF BERGER & MONTAGUE,
P.C. AS AN INTERIM CO-LEAD
COUNSEL IN THE DIRECT
PURCHASER CASES**

Date: June 8, 2007
Time: 9:00 a.m.
Place: Courtroom 10

RESPONSE AND NOTICE OF CROSS-MOTION AND CROSS-MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 9:00 a.m. on June 8, 2007, or as soon thereafter as the matter may be heard, Plaintiff Nathan Muchnick, Inc., through its undersigned counsel will, and hereby do, move this Court, before the Hon. Susan Illston at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, for an Order appointing Berger & Montague, P.C. as an Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs.

This motion is made pursuant to Rule 23(g) of the Federal Rules of Civil Procedure and on the grounds that this complex case will benefit from the appointment of Interim Lead Counsel and that Berger & Montague, P.C. is experienced and well qualified to serve as Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs. This motion is based on this Response and Notice of Cross-Motion and Cross-Motion, the following Memorandum of Law, all pleadings and records on file, and any additional briefing and argument presented to the Court before or at the hearing on this Cross-Motion.

MEMORANDUM OF LAW

A. INTRODUCTION

Pursuant to Rule 23(g) of the Federal Rules of Civil Procedure, Plaintiff Nathan Muchnick, Inc. respectfully submits this memorandum in support of its cross-motion for appointment of the law firm of Berger & Montague, P.C. ("Berger & Montague") as one of four Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs in this consolidated multidistrict litigation.¹ Appointment of lead counsel here will ensure the orderly and efficient prosecution of this litigation, which

¹ The Nathan Muchnick action was the second Direct Purchaser Plaintiff action filed in any court. It was filed in the District of New Jersey on December 19, 2006, and was just transferred to this District last week, pursuant to the April 23, 2007 Order of the Judicial Panel on Multidistrict Litigation (the "MDL Panel"). See *Nathan Muchnick, Inc. v. Sharp Corp., et al.*, No. 3:07-cv-02326-SI, docketed May 1, 2007. Berger & Montague has been Nathan Muchnick's antitrust counsel since 1998.

1 involves approximately two dozen Direct Purchaser Plaintiff class actions and numerous related
2 indirect purchaser actions. Berger & Montague – a firm consisting of 70 lawyers, approximately
3 half of whom specialize in antitrust litigation – was founded in 1970 to concentrate on the
4 representation of plaintiffs in a series of antitrust class actions. David Berger helped pioneer the use
5 of class actions in antitrust litigation. The shareholders in the Berger & Montague antitrust
6 department alone collectively have approximately two hundred years of experience litigating
7 antitrust class action cases. Thus, Berger & Montague is well-qualified to serve as one of the interim
8 lead counsel in this case.

9 While the co-lead counsel papers filed by the Pearson, Simon group tout their “inclusive”
10 management style, and their commitment to a “cooperative” approach among all counsel, Pearson,
11 Simon brief at 14 (Docket No. 14), they have excluded from their proposed leadership structure all
12 counsel for Plaintiffs filing on the East Coast – including for the 4 Direct Purchaser Plaintiffs who
13 filed in the District of New Jersey and the 2 Direct Purchaser Plaintiffs who filed in the Southern
14 District of New York. Moreover, the Pearson, Simon group held no organizational meeting of
15 counsel, a standard practice employed in multidistrict litigation – or, at least none which included
16 counsel for the East Coast Plaintiffs. While the multidistrict litigation transfer provision of 28
17 U.S.C. §1407 provides for transfer of cases to promote the just and efficient conduct of the related
18 actions, it is not intended to be a “winner takes all” provision designed to reward those plaintiffs who
19 were prescient enough to file in the transferee jurisdiction – or, in this case, either in the transferee
20 jurisdiction or on the transferee “coast”.

21 Berger & Montague takes no position on which of the West Coast firms should be among
22 a 4-firm leadership structure overseeing the direct purchaser cases but instead recommends a
23 leadership structure consisting of 2 firms representing Direct Purchaser Plaintiffs who filed their
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1 cases in the United States District Courts in the Eastern United States and 2 of the West Coast firms.²
 2 Berger & Montague respectfully moves to be appointed as one of those co-leads.

3 **B. BACKGROUND**

4 This proceeding stems from an alleged global price-fixing conspiracy involving Thin-Film
 5 Transistor Liquid Crystal Display ("TFT-LCD"). TFT-LCD products are used as display screens in
 6 televisions, computer monitors, cellular phones and other electronic devices. The TFT-LCD industry
 7 is oligopolistic in nature. Defendants control the majority of the TFT-LCD market, which annually
 8 generates worldwide revenues in excess of \$60 billion.

9 In December, 2006, published reports revealed that the United States Department of Justice
 10 as well as antitrust authorities in Asia and Europe were conducting a coordinated investigation into
 11 a global price-fixing cartel involving TFT-LCD products. Shortly thereafter civil cases were filed
 12 throughout the country on behalf of both direct and indirect purchasers of TFT-LCD products.
 13 Plaintiffs allege that these defendants participated in an illegal price-fixing conspiracy.

14 On April 23, 2007, after extensive briefing and oral argument, the MDL Panel transferred
 15 the TFT-LCD antitrust cases to this Court for consolidated or coordinated pretrial proceedings. It
 16 is important to note, however, that a significant number of the Direct Purchaser Plaintiff actions were
 17 originally filed in districts on the East Coast. Of the approximately two dozen direct purchaser
 18 actions currently pending before this Court, 6 were filed on the East Coast (4 in the District of New
 19 Jersey, and 2 in the Southern District of New York).³ Indeed, 4 of the first 6 Direct Purchaser
 20

21 ²As detailed below, the law firm of Cohen, Milstein, Hausfield & Toll, P.L.L.C. – one of the
 22 four firms proposed as Direct Purchaser Plaintiffs' Co-Lead Counsel in the Pearson, Simon papers
 23 – also filed papers before the MDL Panel in an indirect purchaser action in which it was serving as
 24 counsel. In that capacity, the Cohen, Milstein firm took positions contrary to the interests of the
 25 Direct Purchaser Plaintiffs, and, as such, the Cohen, Milstein firm has a disabling conflict which
 precludes it from serving as one of the Co-Lead Counsel for the Direct Purchaser Plaintiffs in this
 action.

26 ³Although certain of the other proposed interim lead counsel have filed unnecessary
 27 duplicative, identical class actions on behalf of numerous individual plaintiffs, Berger & Montague
 28 has filed only one class action case, in the District of New Jersey.

1 Plaintiff cases were filed in the Eastern United States, each by different law firms. The appointment
 2 of two East Coast firms among Interim Co-Lead Counsel will ensure that the Direct Purchaser
 3 Plaintiffs who originally filed on the East Coast will not be penalized by having their counsel
 4 excluded from the proposed leadership structure of Co-Lead Counsel in the Direct Purchaser
 5 Plaintiff cases. Berger & Montague is eminently qualified to serve as one of Interim Co-Lead
 6 Counsel for the Direct Purchaser Plaintiffs.

7 **C. ARGUMENT**

8 **1. The Appointment of Interim Lead Class Counsel Is Appropriate**
 9 **Under Rule 23(g)**

10 Rule 23(g) of the Federal Rules of Civil Procedure dictates that a court “may designate
 11 interim counsel to act on behalf of the putative class before determining whether to certify the class
 12 as a class action.” Fed. R. Civ. P. 23(g)(2)(A). The appointment of interim class counsel is
 13 “essential for efficient case management” in cases where, as here, multiple overlapping and
 14 duplicative class actions have been transferred to a single district. *In re Air Cargo Shipping Services*
 15 *Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006).

16 **a. Berger & Montague Has Extensive Antitrust Class Action Experience**

17 Berger & Montague has over 35 years of experience litigating complex, multidistrict class
 18 action antitrust cases. Pioneering the development and prosecution of antitrust class actions since
 19 its founding in 1970, Berger & Montague has recovered billions of dollars for its clients in ground-
 20 breaking settlements and trial verdicts. Berger & Montague is one of the largest class action law
 21 firms in the nation, with nearly 70 lawyers, approximately half of whom focus primarily on antitrust
 22 class actions. The firm’s experienced antitrust lawyers have earned judicial praise, national and
 23 international recognition and the respect of their colleagues and adversaries in the plaintiffs’ and
 24 defense bars. *See* Berger & Montague firm resume, attached as Exhibit A to the Declaration of H.
 25 Laddie Montague, Jr. in Support of Plaintiff Nathan Muchnick, Inc.’s Response to the May 4, 2007
 26 Motions for Appointment of Direct Purchaser Plaintiffs’ Interim Co-Lead Counsel, and Cross-
 27 Motion for Appointment of Berger & Montague, P.C. as an Interim Co-Lead Counsel in the Direct
 28 Purchaser Cases (“Montague Decl.”).

1 Berger & Montague has served as Lead or Co-Lead counsel in many of the most significant
 2 civil antitrust cases over the last 35 years, and has tried more antitrust and other complex class action
 3 cases than almost any other plaintiffs' class action firm in the country. The Berger & Montague
 4 attorneys who will be working on this case include:

5 **i. H. Laddie Montague, Jr.**

6 The Chairman of the firm's Antitrust Department, Mr. Montague has been litigating complex
 7 antitrust class actions since David Berger helped pioneer the use of the class action device in antitrust
 8 litigation. In 1980, Mr. Montague was co-lead and co-trial counsel of a corrugated sheet plant
 9 subclass and successfully tried the case against the lone non-settling defendant. *In re Corrugated*
 10 *Container Antitrust Litigation*, MDL No. 310 (S.D. Tex.). In 1976, Mr. Montague was co-lead and
 11 co-trial counsel in *In re Master Key Antitrust Litigation*, MDL No. 45 (D. Conn.), which settled after
 12 plaintiffs tried their case before a jury. In 1998, Mr. Montague was one of the co-lead and co-trial
 13 counsel who partially settled and tried *In re Brand Name Prescription Drugs Antitrust Litigation*,
 14 No. 94C897, MDL 997 (M.D. Ill.). Although not an antitrust case, Mr. Montague was one of 3 co-
 15 trial counsel in the *Exxon Valdez Oil Spill Litigation* trial, No. A89-0095-CV (D. Alaska). He is a
 16 fellow of the American College of Trial Lawyers.

17 As one of four co-lead counsel in *In re Brand Name Prescription Drugs Antitrust Litigation*,
 18 Mr. Montague helped recover over \$700 million for class members, and as one of three co-lead
 19 counsel in *In Re High Fructose Corn Syrup Antitrust Litigation*, Mr. Montague helped obtain a
 20 settlement of over \$500 million. Mr. Montague has served as Co-Lead Counsel in numerous other
 21 antitrust class action cases.

22 Praised by judges and long held in the highest regard by his peers, Mr. Montague has also
 23 been recognized by the international legal community as an authority on class actions and antitrust
 24 law, having been invited to present at the Joint European Commission International Bar Association
 25 program on antitrust litigation in Brussels in March 2007 and at the European Organization for
 26 Cooperation and Development in Paris in June 2006.

1 **ii. Ruthanne Gordon**

2 Ruthanne Gordon, the second woman to be named partner at Berger & Montague, has over
 3 25 years of experience litigating complex class actions, and has more than a decade of experience
 4 litigating complex, multi-party antitrust class actions. In the last few years alone, Ms. Gordon has
 5 acted as one of the lead lawyers in antitrust class actions resulting in nearly \$400 million of
 6 settlements for injured class members, including *In re Microcrystalline Cellulose Antitrust Litigation*
 7 (combined settlements of \$50 million) and *In re Currency Conversion Fee Antitrust Litigation* (\$336
 8 million settlement pending). Along with her partner, Mr. Montague, Ms. Gordon is currently acting
 9 as one of four Co-Lead Counsel in *In re Methyl Methacrylate (MMA) Antitrust Litigation* (E.D. Pa.).

10 **b. Plaintiff Nathan Muchnick, Inc. Takes No Position On Which West**
 11 **Coast Firms Should Act As Co-Lead Counsel, But Notes That Prior**
 12 **Positions Taken By The Cohen Milstein Firm Disable It From Serving**
 As Co-Lead Counsel For Direct Purchaser Plaintiffs In This Action

13 While the Pearson, Simon group properly notes the need for coordination between the direct
 14 and indirect purchaser plaintiffs to ensure the economical and efficient prosecution of the related
 15 cases, the potentially significant conflicts of interest between the two classes of purchasers mandate
 16 clearly separate leadership structures for the direct and indirect purchaser plaintiffs. *Cf. Strigliabotti*
 17 *v. Franklin Resources, Inc.*, 2006 WL 2792417, at *4 (N.D.Cal., Sept. 27, 2006) (“[T]he class and
 18 the derivative actions would be competing for the same pool of money, thus creating a structural
 19 incentive to favor one group over the other. The Court does not believe that these competing claims
 20 should be combined in a single lawsuit, *litigated by the same attorneys.*”) (footnote omitted,
 21 emphasis added).

22 The Cohen Milstein firm, in its papers filed before the MDL Panel in this case, has itself
 23 raised in stark terms the conflict between the economic interests of direct purchasers, on the one
 24 hand, and indirect purchasers on the other. In response to an argument before the MDL Panel that
 25 direct purchasers should generally be given priority over indirect purchasers in actions against a
 26 common defendant, the Cohen Milstein firm, which filed both indirect, as well as direct purchaser
 27 class actions, stated: “Indirect purchasers – particularly retail consumers – collectively bear the brunt
 28 of antitrust violations because, as well-accepted economic theory explains, direct purchasers tend

1 to pass overcharges down the chain of distribution.” Plaintiffs Judd Eliasoph, et al. Omnibus
 2 Response to the Cross-Motion of Roberta Harrell for Transfer and Coordination in the District of
 3 New Jersey, and the Cross-Motion of Nathan Muchnick, Inc. at 4 (excerpt attached as Exhibit B to
 4 Montague Decl.).⁴

5 In *In re Microsoft Corp. Antitrust Litigation*, 218 F.R.D. 449 (D. Md. 2003), the court
 6 recognized this conflict in the context of a motion to certify where counsel sought to represent the
 7 direct purchaser class where the same counsel had reached a preliminary settlement on behalf of a
 8 class of indirect purchasers. The court denied that motion, citing counsel’s having created an
 9 “irreconcilable conflict”:

10 This dual scenario places plaintiff’s counsel in a position of irreconcilable conflict
 11 because they seek to represent in DeJulius an end-user class and they seek to
 12 represent here a class of OEMs and other persons who sold to the end-users. In light
 of this conflict, the “adequacy” prong of the Rule 23 test clearly cannot be met.

13 Because counsel themselves created the controversy and then searched for clients to
 14 pursue it, they were blinded to the conflict of their position in arguing that different
 groups of their clients are the ones entitled to recover damages.

15 *Id.* at 452 (footnote omitted).

16 Neither this Court, the class of Direct Purchaser Plaintiffs, nor other class counsel should be
 17 burdened with the complications that will result from either actual conflicts or the appearance of
 18 such conflicts by a co-lead counsel in this case.

21 ⁴ The Cohen Milstein firm filed its first 2 indirect purchaser cases on December 13, 2006.
 22 The firm did not appear as counsel on any Direct Purchaser Plaintiff case until a month later. On
 23 May 2, 2007, on the eve of the filing of the Pearson, Simon group Direct Purchaser Plaintiffs co-lead
 24 motion, the Cohen Milstein firm filed notices of withdrawal as counsel in its 3 indirect purchaser
 25 cases, instead opting to seek a place within the Direct Purchaser Plaintiff leadership structure. *See*
 26 *Jamie Maite v. LG Philips LCD Co., Ltd., et al.*, No. 3:06-cv-07638-SI, Docket No. 27; *Henry*
 27 *Truong v. LG Philips LCD Co., Ltd., et al.*, No. 3:06-cv-07639-SI, Docket No. 25; *Sara Cabezas v.*
 28 *LG Philips LCD Co., Ltd., et al.*, No. 3:07-cv-00084-SI, Docket No. 15. Meaningful attorney-client
 relationships between class counsel and the named representatives ensures the most vigorous
 possible representation of the interests of the Direct Purchaser Plaintiff class. The opportunistic
 obtaining and shedding of clients should not be countenanced by a lead counsel appointment.

c. **Selection of Berger & Montague as Co-Lead Counsel Will Benefit All Direct Purchaser Plaintiffs And Will Ensure Fair Treatment Of Those Plaintiffs Selecting East Coast Forums**

Of the approximately two dozen direct purchaser cases filed in this litigation, 6 were originally filed on the East Coast: 4 in the District of New Jersey, and 2 in the Southern District of New York. The Direct Purchaser Plaintiffs who originally filed their actions on the East Coast should not be penalized for their original forum choices. Attorneys from cases transferred from the East Coast should have equal representation as Co-Lead Counsel. It is respectfully submitted that Berger & Montague, P.C. be appointed as one of those Interim Co-Lead Counsel.

Dated: May 9, 2007

Respectfully submitted,

/s/ H. Laddie Montague, Jr.

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